

Arbitration - Switzerland

Parties' right to be heard on costs

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Most arbitration rules and laws are silent on the procedure in determining the amount, allocation, advance and security of arbitration costs and expenses. More often than not, such issues are uncontroversial; parties pay their advances (including value-added tax advances) when so requested, the arbitral institution (or the arbitration tribunal where applicable) sets the final costs and expenses of the arbitration process; and the arbitral tribunal apportions these between the parties based on the success of the respective claims, relying on the parties' final submissions on costs.

But what if no such submission on costs is filed? The Supreme Court recently held that it was unlikely that arbitrators operating in Switzerland would be requested, under the parties' right to be heard, to invite the parties to make their determination specifically on the amount and apportionment of arbitration costs and expenses prior to any decision. Rather, the court held that it was sufficient that the parties be given the opportunity to express their views on costs in the various submissions filed in the proceedings.⁽¹⁾

However, when the arbitral tribunal requests the parties' submission on the issue of costs and expenses, or expressly provides for such submission, it may not make its final determination based on its sole discretion before such a submission has been filed. Such practice would be contrary to the parties' right to be heard and thereby justify the annulment of the dispositive part on arbitration costs and expenses, regardless of the chances of success of the disregarded arguments.

In the case at hand, the parties had expressly requested the opportunity to file a submission on costs, and the Court of Arbitration for Sports panel had expressly invited the parties to file such a submission before a given deadline. The panel eventually issued its final award, including a section on arbitration costs, before the deadline had passed. Only the respondent in the arbitration proceeding challenged the final award on this point. The judges upheld the challenge and annulled the part of the award on costs.

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Endnotes

(1) Decision 4A_600/2010 of March 17 2011, in *Federation X v Federation A*.

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